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No. 01-1686

In the Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,

Petitioners,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING INCORPORATED; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's interlocutory decision when that court remanded for factual findings that may render the petition moot.

2. Whether the Sixth Circuit erred in following every other court of appeals that has addressed the question in ruling that a bankruptcy plan of reorganization may include a release of non-consenting creditors' claims against non-debtors where the plan provides for payment of those creditors' claims, where the release is necessary to resolve complex mass litigation at the heart of the reorganization, and where other "unusual circumstances" are present.

RULE 29.6 STATEMENT

Dow Corning Corporation is 50% owned by Corning Incorporated and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of The Dow Chemical Company.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Dow Corning's Chapter 11 bankruptcy proceeding has been pending for more than seven years. After years of negotiations among the relevant parties, the bankruptcy and district courts have approved an Amended Joint Plan of Reorganization ("Plan"). Over 94% of the hundreds of thousands of Dow Corning creditors who cast ballots voted in favor of the Plan. Among these creditors are more than 330,000 tort claimants who voted overwhelmingly to support the Plan, which sets aside $2.35 billion (net present value) to resolve their claims in full.

Notwithstanding the dramatic support for the Plan and the Plan's ability to pay all claims in full through settlement or litigation, 53 tort claimants from Nevada have petitioned this Court to grant review and, thereafter, issue a decision that would destroy the Plan and send Dow Corning and its creditors back to the drawing board.[1] Their petition wholly fails to satisfy the stringent standards for granting certiorari.

First, it is premature. Petitioners object to the legal standard adopted by the Sixth Circuit for permitting, in rare cases, the release of claims against non-debtors, but that court has remanded the case to the district court for additional findings in light of that standard. Petitioners have argued vigorously before the district court that the facts do not satisfy

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[1] Petitioners actually suggest that the Plan should somehow remain in place without the release provision challenged in their petition. The Plan itself, however, provides expressly that it shall not go into effect without the release provision, Plan § 7.2.1, and courts "cannot, sua sponte, modify [a] Chapter 11 plan." *In re Mcorp Financial, Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex.), appeal dismissed, 139 B.R. 820 (S.D. Tex. 1992); see also *Memphis Bank & Trust Co.* v. *Whitman*, 692 F.2d 427, 431 (6th Cir. 1982).

the Sixth Circuit's criteria and that the Plan provision to which petitioners object therefore fails. The parties are currently awaiting further findings of fact from the district court, and a ruling in petitioners' favor would moot their certiorari petition.

Second, petitioners do not identify any appropriate grounds for certiorari review. The Sixth Circuit's decision permits a non-debtor release only in the rare case where a combination of enumerated "unusual circumstances" is present. Cases presenting such circumstances—where, among other things, a global release is necessary to resolve complex mass litigation requiring reorganization, is overwhelmingly supported by creditors, and injures no one because the plan provides for payment of all claims—have occurred only a handful of times. And in each instance, the lower courts have upheld the non-debtor release. Petitioners do not identify, and respondents are not aware of, any federal court that has refused a non-debtor release in such a case. Instead, petitioners rely on decisions involving more run-of-the-mill situations that would not have justified a non-debtor release under any standard, including that adopted by the Sixth Circuit in this case. Thus, not only are the courts of appeals in accord, but the Sixth Circuit's opinion does not conflict with any decision by this Court. Petitioners invoke *Callaway* v. *Benton* and *United States* v. *Energy Resources Co.*, but both decisions are consistent with the Sixth Circuit's ruling here. In short, nothing in the decision below warrants certiorari review.

STATEMENT OF THE CASE

Background

Dow Corning filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code in May 1995. By that time, Dow Corning had been involved in tort litigation with recipients of its silicone gel breast implants for several years. The United States Trustee appointed the Official Tort Claimants Committee ("TCC")—a respondent here—to represent the interests of several hundred thousand tort claimants in Dow Corning's bankruptcy case. After years of hard-fought litigation between the debtor and the TCC, the parties were finally able to agree, in the summer of 1998, on the outline of a plan of reorganization that would garner the TCC's support.

Agreement On A Plan

By the end of 1998, the parties had settled on the details of the agreed Plan and submitted it to the bankruptcy court for approval. Under the terms of the Plan, tort claimants are free to pursue either settlement or litigation. Dow Corning agreed to fund the "Settlement Facility" with up to $2.35 billion (net present value)—including an initial $985 million cash payment—with the size of claimants' recoveries dependent on the nature of their underlying medical conditions. Plan § 5.3; Amended Joint Disclosure Statement § 1.4. Although it is hotly disputed whether silicone implants cause disease, claimants can recover from the Settlement Facility without

having to prove that Dow Corning's implant products caused their alleged ailments.[2]

Claimants who opt for litigation will bring their claims against a "Litigation Facility," also created under the Plan and designed to mirror the existing tort system in all material respects. Dow Corning agreed to provide up to $400 million (net present value) of the overall $2.35 billion to pay tort claims (and related expenses) resolved in litigation against the Facility. Pet. App. 239a. The district court will develop, implement and monitor this claims resolution process, which will include ADR techniques designed to resolve claims more efficiently. C.A. Jt. App. 856-857, 1002. There was no challenge in the Sixth Circuit to the adequacy of the $2.35 billion being made available to resolve all claims, and the bankruptcy and district courts found that the $400 million set aside for litigation claims will satisfy all of those claims in

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[2] Petitioners assert that "debtor's culpability" for disease arising from the use of breast implants "is well established." Pet. 6 n.7. But the Ninth Circuit decision cited for this proposition, *Hopkins* v. *Dow Corning Corp.*, 33 F.3d 1116 (1994), merely upheld a 1991 jury verdict for a single implant recipient. Since *Hopkins*, certain reports of scientific experts have created a more difficult environment for claimants who wish to litigate disease claims. See, *e.g.*, *Meister* v. *Medical Engineering Corp.*, 267 F.3d 1123, 1124-1126, 1130-1131 (D.C. Cir. 2001). While the debtor and the TCC strongly disagree about the nature of the scientific evidence on disease causation, the agreement of the debtor and the Shareholders to give up their right to contest causation for settling claimants was a key component of the settlement negotiations that resulted in the Plan.

full. See Pet. App. 247a ("The evidence was overwhelming that $400 million net present value would be more than sufficient to pay all personal injury claims resolved through litigation in full even after factoring in the costs of the process"); *id.* at 139a (affirming bankruptcy court's finding that "the $400 million net present value funding of the Litigation Facility is almost five times what will be necessary to satisfy all the claims against the Litigation Facility").

Dow Corning Shareholders And The Plan's Release Provisions

Dow Corning's shareholders—Dow Chemical and Corning—are not manufacturers of silicone breast implants or other medical products. *In re Dow Corning Corp.*, 113 F.3d 565, 570 (6th Cir. 1997). They nonetheless agreed to the Plan, though it entailed substantial costs on their part, most significantly a $2.35 billion depletion of their equity in Dow Corning. The Plan also effectuates a compromise with respect to insurance policies co-owned with Dow Corning, pursuant to which hundreds of millions of dollars of insurance proceeds are made available to fund the Plan. Pet. App. 94a; C.A. Jt. App. 3515-3523. In addition, the Shareholders agreed to provide Dow Corning with a $300 million credit facility at below-market terms to help ensure that Dow Corning would have the liquidity to pay claimants in the first ten years of the Plan's operation, when cash demands are projected to be heaviest. C.A. Jt. App. 1313-1315. Pursuant to the Plan, the value derived from these concessions will help fund payments to tort claimants. The Plan provides a centralized mechanism to resolve all tort claims related to the debtor's products through settlement or litigation, and a single fund from which these claims would be paid in full. Pet. App. 7a-8a.

In exchange for these contributions, the Plan provides the Shareholders with a release against products liability claims relating to Dow Corning's products: "all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims" against the Shareholders and certain other parties that contributed to the Plan—settling insurers and Dow Corning subsidiaries and affiliates. Plan § 8.3; Pet. App. 329a-330a. "[A]ll Persons who have held, hold, or may hold Released Claims * * * shall be permanently enjoined" from pursuing those claims against the released parties. Plan § 8.4; Pet. App. 334a.

Under the Plan, the alleged injuries that serve as the basis for claims against the Shareholders will be compensated through claims asserted in the Settlement and Litigation Facilities. Amended Joint Disclosure Statement § 6.7.C.1; Plan § 8.3. As a result, the Plan provides for payment in full for all alleged injuries arising from the debtor's products regardless of whether the claim was originally asserted against the debtor, any of its subsidiaries, an insurer, or a Shareholder.[3] *Ibid.*

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[3] It will actually be easier for a claimant to recover in the Litigation Facility than it would be to recover against a Shareholder. For example, a Nevada claimant seeking to recover against Dow Chemical would have to start by proving all of the elements of a claim against the debtor—namely, that the debtor's breast implants are defective or harmful and caused the claimant's injury—and then prove some additional elements against Dow Chemical. See *Dow Chemical Co.* v. *Mahlum*, 970 P.2d 98, 106, 107 (Nev. 1998) ("All of the

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Bankruptcy Court Approval

The Plan and a related Disclosure Statement were submitted to the bankruptcy court in November 1998. After additional negotiations with objecting parties and modifications to the documents, the court approved the Disclosure Statement and authorized the Plan's proponents to mail it and the Plan to creditors for a vote. Tort claimants voted overwhelmingly for the Plan. Over 94% of the more than 330,000 tort claimants who voted on the Plan cast favorable ballots. C.A. Jt. App. 411. Other classes likewise registered strong support for the Plan—*e.g.*, 91.4% among members of the Physicians' Class and 99% of the Health Insurer Class. *Ibid.* Some objectors remained, however, and the bankruptcy court considered their arguments in conjunction with a 12-day confirmation hearing in June and July of 1999. The court ultimately confirmed the Plan and overruled the objections in a confirmation order, findings and conclusions, and multiple opinions issued on or shortly after November 30, 1999. Pet. App. 309a-325a.

Notwithstanding its November 30 order confirming the Plan in its entirety, however, the bankruptcy court issued another opinion on December 21, 1999 that purported to limit the scope of the Plan's third-party release. Reasoning that it

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[3](...continued)
Mahlums' tort claims were based, ultimately, on the assumption that Mahlum's injuries were proximately caused by defective silicone breast implants," and "[t]he Mahlums had to show that Dow Corning was negligent or manufactured unsafe, defective breast implants *before showing that Dow Chemical was liable*") (emphasis added).

lacked the power to enforce the release against non-consenting creditors, the bankruptcy court read the Plan to shield third parties only from claimants who actually voted in favor of the Plan. Pet. App. 260a-285a.

District Court And Sixth Circuit Decisions

On appeal, the district court affirmed the confirmation order and ruled that the release and injunction provisions apply as written—*i.e.*, to all persons asserting claims relating to the debtor's silicone implant products, not just the claimants who voted in favor of the Plan. Pet. App. 74a-90a, 236a. Accordingly, the district court reversed the December 21 limitation imposed by the bankruptcy court on the third-party release. In upholding the release, the district court found that this case satisfied the "unusual circumstances test" under which, in "cases which involve mass litigation," courts have upheld non-debtor releases in bankruptcy plans against consenting and non-consenting creditors alike. *Id.* at 84a.

The Sixth Circuit affirmed in part and remanded for further factual findings. Pet. App. 24a. Regarding the bankruptcy court's authority to release the claims of non-consenting creditors against non-debtors, the court cited 11 U.S.C. § 105(a), which gives bankruptcy courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." *Id.* at 11a. Moreover, the court observed, 11 U.S.C. § 1123(b)(6) allows a reorganization plan to "include any * * * appropriate provision not inconsistent with the applicable provisions of this title." *Ibid.* After reviewing the broad equitable powers available in bankruptcy, the court concluded that a non-consensual third-party release could be included in a plan of reorganization. The court then held that

such a release was an "appropriate provision" within the scope of § 1123(b)(6) if specific, extraordinary factors were present. Ultimately, the court concluded that "when a plan provides for the full payment of all claims, enjoining claims against a non-debtor so as not to defeat reorganization is consistent with the bankruptcy court's primary function." *Id.* at 11a-12a.

The specific factors required by the Sixth Circuit's decision to justify a non-consensual third-party release (the "unusual circumstances") are present in cases where:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Pet App. 14a-15a.

The Sixth Circuit recognized that a non-consensual injunction is a "dramatic measure to be used cautiously," Pet.

App. 14a; hence the court's inclusion as the final factor the requirement that the facts on which the injunction is based must be stated with specificity. Here, the bankruptcy court had made findings on each of the elements of the test adopted by the Sixth Circuit. *Id.* at 315a. These findings were broadly stated, however. The Sixth Circuit held that the bankruptcy court's findings concerning the unusual circumstances test "were no more than conclusory statements" that were "not sufficiently specific and explained to support a finding of 'unusual circumstances.'" *Id.* at 15a. The court of appeals thus concluded that "the record produced by the bankruptcy court in this case does not support a finding of 'unusual circumstances' such that we can endorse enjoining non-consenting creditors' claims against a non-debtor," and the court therefore declined to affirm confirmation of the Plan and remanded the case to the district court for further findings.[4] *Id.* at 15a-16a, 24a. The district court has received full briefing on the remanded factual issues and heard oral argument on June 14. The parties are currently waiting for the district court to issue its findings.

REASONS FOR DENYING THE PETITION

Petitioners devote the bulk of their petition to a series of arguments on the merits of their position—that there are no circumstances in which a bankruptcy court may enjoin non-

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[4] The bankruptcy judge who oversaw Dow Corning's Chapter 11 proceedings and confirmed the Plan is no longer on the bench, and, as a result, the district court withdrew the reference of the case to the bankruptcy court. See 28 U.S.C. § 157(d). Accordingly, the district court will make any additional factual findings on remand.

consenting creditors' claims against non-debtors in a Chapter 11 reorganization. Petitioners nevertheless posit three reasons why they think the case warrants certiorari review: (1) the Sixth Circuit's opinion implicates a circuit split; (2) the decision is in conflict with this Court's decision in *Callaway* v. *Benton*; and (3) the Sixth Circuit relied on an impermissibly broad reading of this Court's decision in *United States* v. *Energy Resources Co.* All three arguments are incorrect.[5]

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[5] Petitioners also claim (at 24) that the non-debtor release in this case "raises serious and obvious due process concerns and smacks of totalitarianism" because it supposedly "decid[es] thousands of claims against creditors and in favor of the third party, without first hearing those claims and determining their merit." The Plan, submitted jointly by Dow Corning and the Tort Claimants Committee, does no such thing. On the contrary, the Plan provides for either voluntary settlement of claims or litigation in which claimants can obtain full compensation for their injuries.

For the same reason, petitioners' undeveloped reference (at 11) to *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), creates no issue. Not only did that case deal with the very different issues implicated by limited fund class actions—which, the Court noted, lack the broader protections for creditors available in bankruptcy proceedings, *id.* at 860 n.34—but it also involved a proposed settlement in which claimants electing litigation were subject to a damage cap that prevented them from being paid in full. *Id.* at 847 n.23. In contrast, as noted earlier (pp. 4-5, *supra*), the bankruptcy court here found and the district court affirmed that the overall fund of $2.35 billion and the $400 million set aside for

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As an initial matter, this case is an extremely poor candidate for certiorari solely by virtue of its procedural posture. The Sixth Circuit has remanded the matter to the district court for additional fact-finding that could moot the issue raised by petitioners here. At this point, the district court has taken the parties' respective arguments concerning the supplemental findings under advisement. Supreme Court review is inappropriate in this interlocutory posture.

In any event, petitioners identify no proper basis for certiorari review. The supposed "split" they describe among the courts of appeals is illusory. What they characterize as two schools of thought are merely the results flowing naturally from very different factual scenarios. Nor is there any tension, let alone conflict, between the Sixth Circuit's decision and this Court's opinions in *Callaway* and *Energy Resources*. *Callaway* is wholly inapposite and relies on jurisdictional principles that were superseded by statutory amendment decades ago. As for *Energy Resources*, the court of appeals invoked that decision only for two unremarkable and undisputed rules of law, hardly a "[m]istaken[] [e]xpan[sion]" of its "reach." Pet. 29.

I. The Sixth Circuit's Decision Is Interlocutory.

Petitioners ask this Court to review a decision remanding to the district court for further findings of fact. See Pet. App. 24a. Indeed, the non-debtor release that petitioners challenge will survive on remand only if the district court concludes that all seven of the Sixth Circuit's factors are satisfied and, if there is an appeal, the Sixth Circuit subsequently affirms that

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[5](...continued)
litigated claims were ample to satisfy all claims in full.

decision. Proceedings before the district court are ongoing, and, in those proceedings, petitioners have argued strenuously that the factual record will not support the findings the Sixth Circuit demands. While respondents disagree, the district court has yet to issue its decision, and the petition for certiorari will be moot if the district court or the Sixth Circuit rules in petitioners' favor.

That the Sixth Circuit's decision is interlocutory is alone grounds for denying the petition. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916) (concluding that substance of previous decision by court of appeals remanding for further proceedings was now properly before Court because previous decision was interlocutory and thus would not have been proper subject of Supreme Court review). There is no reason for this Court to consider an issue that may be mooted by intervening events.

II. The Sixth Circuit's Decision Does Not Implicate A Circuit Split.

With only minimal discussion, petitioners claim that "[t]he propriety of third party discharge provisions in chapter 11 bankruptcy plans is subject to fundamental and long standing differences in the circuits." Pet. 10-11 (footnote omitted). With even a cursory review of the cases in question, however, perceived differences in legal doctrine are quickly understood as the product of radically different factual

circumstances. Cases petitioners cite upholding non-debtor releases in the Second, Fourth, and Sixth Circuits involved mass litigation claims against the debtor and a combination of "unusual circumstances." In contrast, none of the Fifth, Ninth, and Tenth Circuit decisions on which petitioners rely involved mass litigation or the combination of factors deemed critical to courts on the other side of the supposed "split."

This Court has long recognized that "opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946), overruled in part on other grounds, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Considered in that light, any apparent differences among the circuits quickly disappear.

A. Decisions Upholding Non-Debtor Releases Involve A Collection Of "Unusual Circumstances."

In *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988), the Chapter 11 debtor (Johns-Manville) manufactured asbestos products and declared bankruptcy in large measure because of its "potential liability to persons with latent asbestos-related disease." After Johns-Manville filed its bankruptcy petition, it settled suits with its insurance carriers over the scope of their coverage for asbestos-related injuries. Under the terms of the settlement, the carriers contributed $770 million (purportedly the policy limits) to the debtor's reorganization plan in exchange for their full release from any obligations arising under the disputed policies, which was enforced by permanently enjoining claims against the carriers. MacArthur, a Johns-Manville distributor, challenged the injunction, claiming that it was a co-insured under some of the

policies and might wish to bring suits against the carriers. *Id.* at 91.

The Second Circuit upheld the injunction. The insurance policies were property of the estate, the court reasoned, and the bankruptcy court's "authority to issue the injunction [was] * * * a corollary to [its] power to dispose of assets free and clear and to channel claims to the proceeds." *MacArthur,* 837 F.2d. at 93. "It has long been recognized," the court continued, "that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition." *Id.* at 94. Because MacArthur could bring any claims it would otherwise have against the insurers against the settlement fund instead, the bar on suits against the insurers was within the bankruptcy court's longstanding authority to channel creditors' claims to specified assets. The court found "[a]dditional authority for the injunction" in 11 U.S.C. § 105(a), which the court determined empowers the bankruptcy court "to enjoin suits that might impede the reorganization process." *Id.* at 93.

As in this case, the debtor in *MacArthur* was the target of mass tort claims and as here, the released non-debtors contributed substantially to the debtor's reorganization. Indeed, the contributions from Johns-Manville's insurers were critical to the reorganization, and the insurers would contribute these sums only if they received a release. 837 F.2d at 90; see also *In re Drexel Burnham Lambert Group,* 960 F.2d 285, 293 (2d Cir. 1992) (upholding injunction releasing debtor's officers and directors, in case involving a class of fraud claims against debtor, where the release was "a key component of [a] Settlement Agreement" that was, in

turn, "an essential element of Drexel's ultimate reorganization").

Likewise, the Fourth Circuit upheld a non-debtor release in *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989), another case that turned on the resolution of complex mass litigation against a debtor. Tort claimants in that case were users of the debtor's birth control products who challenged an injunction barring them from suing certain third parties—including Robins's officers and directors—for their injuries. *Id.* at 701. While a court-approved class settlement barred most of these claimants from bringing such suits in any event, the release affected claimants who had opted out of the class to pursue their claims individually. *Ibid.*

The Fourth Circuit relied on a combination of circumstances in upholding the release:

> the Plan was overwhelmingly approved, * * * the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover [although], nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and * * * the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor * * * .

Id. at 702. The court analogized the bankruptcy court's injunction to the "marshaling of assets" doctrine, which empowers a bankruptcy court to direct a creditor to satisfy its claim out of a particular fund. *Id.* at 701. Similarly, the Fourth Circuit held, the bankruptcy court was within its power

in limiting tort claimants to a choice between full recovery under the class settlement and compensation under the reorganization plan. *Ibid.*

In combination with the Second Circuit cases, *Robins* provided the Sixth Circuit with its list of "unusual circumstances" permitting a bankruptcy plan to enjoin claims against non-debtors. See Pet. App. 14a-15a. Among these circumstances is the requirement that the non-debtor provide valuable consideration to the reorganization, that this contribution play a critical role in the reorganization's success, and that the creditors whose claims against third parties are enjoined vote overwhelmingly in favor of the plan. Also crucial to the courts' decisions in *MacArthur*, *Robins*, and this case was the fact that, although claims against non-debtors were released, claimants could receive compensation for their asserted injuries. All three courts thus spoke not in terms of usurping claims but of using the Bankruptcy Code to pay claimants out of specified funds. See *MacArthur*, 837 F.2d at 94; *Robins*, 880 F.2d at 701; Pet. App. 11a.

B. Decisions Rejecting Non-Debtor Releases Do Not Involve Mass Litigation Or Provide For Payment Of Released Claims.

Cases petitioners cite from the Fifth, Ninth, and Tenth Circuits are not to the contrary. None of these cases entailed mass litigation against the debtor, and none of the reorganization plans at issue provided for full payment of the value of any barred claims or involved any of the other "unusual circumstances" that the Sixth Circuit and other courts require, such as a substantial monetary contribution that is essential for the reorganization to succeed.

Indeed, the Fifth Circuit case on which petitioners rely—*In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)—expressly distinguished *Drexel* and *MacArthur* because the claimants in those cases could "recover[] from separate assets." *Id.* at 760. Not only did the Zale bankruptcy have nothing to do with mass tort claims, but "[t]he injunction at issue * * * provided no alternative means for [the claimants] to recover" the value of their claims against the released party. *Id.* at 761.

In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990) (per curiam), modified, 932 F.2d 898 (10th Cir. 1991), did not even involve a reorganization plan. The bankruptcy court in that case permanently barred an attorney who performed pre-bankruptcy work for the debtor from placing a lien against a non-debtor third party for his fees. The case did not involve any mass litigation, and no findings existed that the attorney would receive full compensation through the bankruptcy proceedings or that any of the other "unusual circumstances" were present.

Likewise, *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), involved a single party whose claim against a non-debtor was barred by a bankruptcy court injunction. Here again, mass litigation was not at issue and the Ninth Circuit nowhere found that the plan itself would adequately compensate the party wishing to sue a non-debtor. See also *In re American Hardwoods, Inc.*, 885 F.2d 621, 626-627 (9th Cir. 1989) (noting that even if Ninth Circuit adopted the *Robins* approach to non-debtor injunctions, unusual circumstances present in *Robins* were absent in *American Hardwoods*).

In sum, the "split" of authority petitioners allege simply reflects stark factual differences, as the Third Circuit has recognized: Unlike in *Zale*, *Western Real Estate*, and *Lowenschuss*, "[a] central focus of [the] reorganizations [in *MacArthur*, *Drexel*, and *Robins*] was the global settlement of massive liabilities against the debtors and co-liable parties. Substantial financial contributions from non-debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made these reorganizations feasible." *In re Continental Airlines*, 203 F.3d 203, 212-213 (3d Cir. 2000); see also *In re American Family Enterprises*, 256 B.R. 377, 406 (D.N.J. 2000) ("Those courts which have approved the issuance of permanent injunctions and third-party releases have dealt with unusual cases such as mass tort claims, the resolution of which was reasonable, in the best interests of all parties, and which channeled all such claims to a particular fund provided in whole or in part by third parties"); *id.* at 408 ("[A] careful reading of [*Western Real Estate*, *American Hardwoods*, and *Lowenschuss*] reveals they are distinguishable and none of them involve any 'unusual or extraordinary circumstances'"). And perhaps most importantly, the injunctions at issue in petitioners' Fifth, Ninth, and Tenth Circuit cases simply barred claims against non-debtors without providing for full payment of the claimants' alleged harm, unlike the situation here.

Ignoring the dramatic factual distinctions described above, petitioners stress (at 18) the Ninth Circuit's language in *Lowenschuss* and similar cases to the effect that 11 U.S.C. § 524(e) itself bars a bankruptcy court from approving a non-debtor release in a plan of reorganization. But such language does not present a conflict worthy of certiorari review. By its plain terms, § 524(e) provides only that the discharge of the

debtor (provided in § 1141(d)) does not *itself* discharge non-debtors: "discharge of a debt of the debtor does not affect the liability of any other entity on * * * such debt." It simply does not address whether some other provisions of the Code permit third-party releases. The Sixth Circuit held that Bankruptcy Code § 1123(b)(6), coupled with § 105(b), provided the statutory basis for including a non-debtor release in a reorganization plan. The Sixth Circuit is the first court of appeals to address § 1123(b)(6) in this context—which itself indicates that there is no circuit split—and particularly when combined with the absence of a square conflict in comparable factual settings, this Court's review is not warranted.

As noted earlier, the district court has yet to decide whether this case involves the "unusual circumstances" necessary to justify a non-debtor release, and the Sixth Circuit has yet to review those findings. Until that occurs, it is unclear whether this case even presents the issues raised in the petition. But even if this is a case of "unusual circumstances," it still does not implicate a circuit split—respondents are aware of no court that has denied a third-party release under such conditions.

III. The Sixth Circuit's Decision Is Consistent With This Court's Decision In *Callaway* v. *Benton*.

The Sixth Circuit did not so much as mention *Callaway* v. *Benton*, 336 U.S. 132 (1949), and petitioners' reliance on that case is wholly misplaced. Petitioners invoke *Callaway* for the propositions that bankruptcy courts cannot choose to disregard state laws and that bankruptcy courts may not exert control over a creditor's "internal management." Pet. 26-27. But neither aspect of the *Callaway* decision has any bearing on this case.

Callaway was decided in 1949 under the now superseded Bankruptcy Act. It involved a reorganization plan under which South Western Railroad Company, which had been leasing property to the debtor, was required to sell the property to the debtor or have its lease disaffirmed and its property returned to it. 336 U.S. at 134. South Western's management encouraged shareholders to approve the sale, and management indicated that it would sell the property if a majority of its shareholders agreed. *Id.* at 135. Certain shareholders opposed this procedure on the ground that state law allowed management to consummate the sale only with the shareholders' *unanimous* support. *Id.* at 135-136.

The first portion of the *Callaway* decision on which petitioners rely (at 26) addressed the question whether South Western's sale to the debtor was governed by state or federal law. See 336 U.S. at 136-141. The Court recognized that federal law "specifically provides that the plan of reorganization shall be put into effect, 'the laws of any State or the decision or order of any State authority to the contrary notwithstanding.'" *Id.* at 141. In *Callaway*, however, "[t]here [was] * * * no occasion to override state law" as "[t]he [reorganization] plan implicitly accept[ed] it as controlling." *Ibid.* The Court was thus interpreting the plan; it was not holding, as petitioners would have it, that bankruptcy plans may not interfere with rights otherwise available under state law. On the contrary, the *Callaway* Court expressly recognized that state law must give way where necessary to a plan of reorganization. *Ibid.*; see also *Wright* v. *Union Central Life Ins.*, 304 U.S. 502, 517 (1938) ("Bankruptcy

proceedings constantly modify and affect the property rights established by state law").[6]

Petitioners' reliance on *Callaway* for the proposition that bankruptcy courts may not exercise control over a creditor's "internal management" is likewise inapposite. The district court in *Callaway* attempted to modify South Western's internal decision-making process by changing the level of shareholder support needed to sell corporate assets. The Dow Corning Plan does nothing of the sort. It merely establishes the options creditors have in pursuing payment, something done by every reorganization plan. Indeed, this is precisely what the *unchallenged* portion of the *Callaway* plan did when it directed South Western to choose between selling its property and losing its lease arrangement.

At the heart of the *Callaway* Court's restrictions on the powers of the district court was a concern over the court's jurisdiction. But the statutory basis for the Court's jurisdictional analysis has changed drastically since that case was decided. The Bankruptcy Act then in effect gave district courts exclusive jurisdiction over only "the debtor and its property wherever located." 336 U.S. at 142. What were plainly outside this jurisdictional grant then—"controversies that in some way affect the debtor's estate," *ibid.*—are at the

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[6] The Plan in this case does not give the bankruptcy court the "power to reverse the decisions of the highest courts of the 50 states," as petitioners (at 26) contend. Petitioners will be paid in full for any injuries caused by Dow Corning products under the Plan, and the Plan's third-party injunction prevents them only from suing third parties for the same injuries claimed against Dow Corning.

heart of today's much broader "related to" jurisdiction for bankruptcy cases. See 28 U.S.C. § 1334(b); see also *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 & n.5 (1995) ("'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,'" including "suits between third parties which have an effect on the bankruptcy estate").

In short, *Callaway* has no bearing on the instant suit, and it is no surprise that the Sixth Circuit did not address it in its opinion, although *Callaway* was raised and argued at length in petitioners' Sixth Circuit briefs.

IV. The Sixth Circuit's Decision Is Consistent With This Court's Decision In *Energy Resources*.

Petitioners do not appear to contend that the Sixth Circuit's decision in this case contravenes anything the Court said in *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990). Petitioners argue only that the Sixth Circuit somehow "[m]istakenly [e]xpanded the [r]each" of that decision. Pet. 29. The Sixth Circuit cited *Energy Resources* only twice, however, each time for an unremarkable proposition that is undisputed here. The court of appeals quoted the rule that "bankruptcy courts, 'as courts of equity, have broad authority to modify creditor-debtor relationships.'" Pet. App. 11a (quoting *Energy Resources*, 495 U.S. at 549). Likewise, the Sixth Circuit cited *Energy Resources* for the proposition that, "[c]onsistent with section 105(a)'s broad grant of authority, the Code allows bankruptcy courts considerable discretion to approve plans of reorganization." Pet. App. 11a. Both statements are true to the *Energy Resources* opinion, and neither is in dispute.

Petitioners' claim that *Energy Resources* is factually distinguishable from the instant case is thus wholly irrelevant. And petitioners exaggerate this distinction in any event. In *Energy Resources*, "[t]he IRS was free to collect its debt directly from the third parties if it chose to do so," as petitioners state (at 30). But the IRS could take such action only if the debtor failed to pay the trust fund taxes. 495 U.S. at 547. Plan provisions requiring the IRS to credit payments from the debtor toward this debt first rather than apply the payments to non-trust fund liability (for which the third parties were not liable) thus provided the third parties with valuable protection from IRS action, and left the IRS "at risk for non-trust fund taxes." 495 U.S. at 551. As here, the third parties who received this protection—which this Court upheld—agreed "to advance enough money to rehabilitate the [debtor] corporation," but "only if the court would assure them that the reorganized corporation would pay its 'trust fund' tax debts [for which the third parties were jointly responsible] first." *In re Energy Resources Co.*, 871 F.2d 223, 230 (1st Cir. 1989) (Breyer, J.), *aff'd*, 495 U.S. 545 (1990). Far from conflicting with the Sixth Circuit's decision, therefore, *Energy Resources* plainly supports that decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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